

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY
09/25/2001

*** FILED ***
10/02/2001
CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss
Deputy

LC 2000-002174
Docket Code 019 Page 1
FILED: _____

JORGE LUIS AQUINO LOPEZ
v.
STATE OF ARIZONA

MICHAEL J DEW

GARY L SHUPE

PHX MUNICIPAL CT

RULING/AFFIRM

PHOENIX CITY COURT
Cit. No. 5082885
Charge: 1. DUI
2. AC OF .10 OR HIGHER
DOB: 05-13-1971
DOC: 06-02-1996

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This Court has considered and reviewed the tape record of the proceedings from the trial court, exhibits made of record, and the memoranda submitted.

Appellee was charged on June 2, 1996, with Driving Under the Influence (DUI), a violation of A.R.S. §§ 28-692 (A)(1) and (A)(2) (now §§ 28-1381 (A)(1) and (A)(2)). The matter was set for trial by jury January 7, 1997; however, after Appellee failed to appear for trial, a bench warrant was issued for his arrest. On January 20, 2000 – more than three years later – Appellee succeeding in getting the warrant quashed after posting a \$1,200.00 bond securing his appearance at court.

On May 30, 2000, Judge Michael Carroll specifically denied Appellee's motions for consolidation with other cases raising similar breath test issues, noting in the court log that Appellee's requests for consolidation occurred after a ruling on the admissibility of intoxilyzer evidence in those other cases (Hentges). On September 5, 2000, Appellee filed still another motion, this time asking that the trial court adopt the rulings, findings, and holding of the Hentges' cases. On November 20, 2000, over Appellant's objection,

an evidentiary hearing was held. Appellee was allowed to call an expert witness, who testified that the intoxilyzer at the time of Appellee's breath tests was "operating accurately but not properly." The trial court then applied Hentges' rationale and findings to suppress the intoxilyzer evidence in this case.

The trial judge, the Honorable Michael Lester, approved and adopted the rulings made in the Hentges' cases. He compared the facts he had heard during the evidentiary hearing as similar to those in the Hentges' cases, found Judge Carroll's findings appropriate to the instant case and applied them to this case.

Appellant claims insufficient evidence was presented in the testimony of Chester Flaxmayer to support Judge Lester's order suppressing the blood alcohol evidence.

When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.¹ All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.² If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.³ An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.⁴ When the sufficiency of evidence to support a ruling is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.⁵ The Arizona Supreme Court has explained in *State v. Tison*⁶ that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.⁷

This Court finds that the trial court's determination was not clearly erroneous and was supported by substantial evidence.

¹ *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

² *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

³ *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

⁴ *In re: Estate of Shumway*, 197 Ariz. 57, 3 P.3d 977, review granted in part, opinion vacated in part 9 P.3d 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P.490 (1889).

⁵ *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; *State ex rel. Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

⁶ SUPRA.

⁷ Id. At 553, 633 P.2d at 362.

IT IS ORDERED affirming the Phoenix City Court order suppressing the breath/blood alcohol test results in this case.